EDITOR'S NOTE

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pril 24, 1985

Title: Marie D. Sorenson, etc., Petitioner
v.
Secretary of the Treasury of the United States and
United States

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Greenfield, Peter

Counsel for respondent: Solicitor General

| ntry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Apr 24 1985 | G | Petition for writ of certiorari filed. |
| 2 | May 23 1985 | | Brief of respondents Sec. of Treasury, et al. in opposition filed. |
| 3 | May 28 1985 | | DISTRIBUTED. June 13, 1985 |
| 4 | Jun 17 1985 | | Petition GRANTED. |
| | | | ********** |
| 5 | Jul 8 1985 | G | Motion of Acting Solicitor General to dispense with printing the joint appendix filed. |
| 6 | Aug 5 1985 | | Brief of petitioner Marie D. Sorenson, etc. filed. |
| 8 | Sep 4 1985 | | Order extending time to file brief of respondent on the merits until October 4, 1985. |
| 9 | Sep 4 1985 | | Brief amicus curiae of Connecticut filed. |
| 10 | Aug 30 1985 | | Record filed. |
| 11 | Sep 18 1985 | | Motion of petitioner to dispense with printing the joint appendix GRANTED. |
| 13 | Oct 2 1985 | | Order extending time to file brief of respondent on the merits until November 1, 1985. |
| 14 | Nov 1 1985 | | Brief of respondents Sec. of Treasury, et al. filed. |
| 15 | Nov 19 1985 | | CIRCULATED. |
| 16 | Nov 21 1985 | | SET FOR ARGUMENT, Wednesday, January 15, 1986. (2nd case). |
| 17 | Dec 11 1985 | X | Reply brief of petitioner Marie D. Sorenson, etc. filed. |
| 18 | Jan 15 1986 | | ARGUED. |



IPP

84-1686 (1)

No. _____



# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

MARIE D. SORENSON, on behalf of herself and all others similarly situated,

Petitioner,

v.

THE SECRETARY OF THE TREASURY OF THE UNITED STATES and THE UNITED STATES OF AMERICA,

Respondents.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## Question Presented

This petition presents the following question of statutory interpretation:

> Do 42 U.S.C. § 664 or 26 U.S.C. § 6402 authorize the Secretary of the Treasury to take earned income credit benefits and give them to states as reimbursement for public assistance payments?

The question has been answered in the negative by the Courts of Appeals for the Second and Tenth Circuits; it was answered in the affirmative, in this case, by the Court of Appeals for the Ninth Circuit. Consequently, the Secretary of the Treasury must currently apply these Federal statutes differently in different parts of the country.

## Table of Contents

## Table of Authorities

Cases:



Statutes:

Rule:



Other:

## Opinions Below

The opinion of the Court of Appeals for the Ninth Circuit is reported at 752 F.2d 1433. The opinion of the District Court for the Western District of Washington is reported at 557 F. Supp. 729.

## Jurisdiction

Jurisdiction to review the decision of the Court of Appeals by writ of certiorari is conferred on this Court by 28 U.S.C. § 1254. The decision of the Court of Appeals was filed on February 5, 1985.

## Statutes

42 U.S.C. § 664(a):

> Upon receiving notice from a State agency administering a plan approved under this part that a named individual owes past-due support which has been assigned to such State pursuant to section 602(a)(26) of this title, the Secretary of the Treasury shall determine whether any amounts, as refunds of Federal taxes paid, are payable to such individual (regardless of whether such individual filed a tax return as a married or unmarried individual). If

> the Secretary of the Treasury finds that any such amount is payable, he shall withhold from such refunds an amount equal to the past-due support, and pay such amount to the State agency (together with notice of the individual's home address) for distribution in accordance with section 657(b)(3) of this title.

26 U.S.C. § 6402(c):

> The amount of any overpayment to be refunded to the person making the overpayment shall be reduced by the amount of any past-due support (as defined in section 464(c) of the Social Security Act) owed by that person of which the Secretary has been notified by a State in accordance with section 464 of the Social Security Act. The Secretary shall remit the amount by which the overpayment is so reduced to the State to which such support has been assigned and notify the person making the overpayment that so much of the overpayment as was necessary to satisfy his obligation for past-due support has been paid to the State. This subsection shall be applied to an overpayment prior to a person's future liability for an internal revenue tax.

The remaining portions of 28 U.S.C. § 6402 and parts of § 6401 are set forth in the appendix at A-17. The text of 26 U.S.C. § 32 (formerly 26 U.S.C. § 43) is set forth in the appendix at A-85.

## Statement of the Case

When a child receives public assistance from a state, the child's custodian must assign to the state any rights to collect child-support payments from a noncustodial parent.[1] In 1981, as part of the Omnibus Budget Reconciliation Act of that year, Congress enacted legislation to assist states in collecting such assigned child-support payments.[2] The new law directed the Secretary of the Treasury to take funds owed to responsible noncustodial parents as "refunds of Federal taxes paid" and to pay the funds to the states entitled to public-assistance reimbursement. It is sometimes referred to as an

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1. 42 U.S.C. § 602(a)(26).

2. Section 2331, Pub.L. No. 97-35, 95 Stat. 860. Parts of § 2331 have been codified at 42 U.S.C. § 664 and 26 U.S.C. § 6402.

"intercept" law because it involves the interception of tax refunds.

Plaintiff Marie Sorenson was affected by the intercept law because she married a man who had a support obligation for a child of a previous marriage.[3] The child had received public assistance from the state of Washington, and consequently, the right to collect child support from Mr. Sorenson had been assigned to the state. This brought any arrearage in Mr. Sorenson's support obligation under the purview of the intercept law. Because of a disability, Mr. Sorenson was unable to work; consequently, he was in arrears in his support payments.

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3. The facts of plaintiff's case have not been disputed. The factual statements recited here, unless another source is given, are based on plaintiff's complaint which was verified by a separate declaration. The case was decided by the District Court on a motion for summary judgment, and the court accepted plaintiff's uncontroverted factual allegations.

Plaintiff and her husband filed a joint Federal income tax return for 1981. All income was from plaintiff's wages and her unemployment compensation benefits. The Sorensons were entitled to a refund and an earned income credit benefit.

The earned income credit benefit is a payment available through the tax refund process to a family with earned income of less than $10,000 a year and with a dependent child. The amount of the benefit is $550 ($500 before 1984) or less depending on the amount of earned income.[4]

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4. See 26 U.S.C. § 32 (set out in the Appendix at A-85). "While the credit benefits are distributed through the tax refund process, a recipient need not have owed or paid any taxes to be eligible." Rucker v. Secretary of the Treasury, 751 F.2d 351, 356 (10th Cir. 1984). "Most of the people who receive [earned income credit benefits] have little or no tax liability; part or all of what they receive exceeds the amounts withheld from their earnings. . . . [T]he earned income credit is in substance an item of social

The Secretary initially asserted the authority under the intercept law to withhold all funds owed to the Sorensons up to the amount of Mr. Sorenson's outstanding obligation to the state. Plaintiff challenged that assertion in this action, brought on behalf of a class of non-debtor spouses.[5] Ultimately, (after the hearing

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welfare legislation, intended to provide low-income families with 'the very means by which to live' . . . . ." In re Searles, 445 F. Supp. 749, 752-53 (D. Conn. 1978). What distinguishes the adults in families eligible for earned income credit benefits is that they are working rather than receiving welfare. See S. Rep. No. 94-36, 94th Cong., 1st Sess. 11,, reprinted in 1975 U.S. Code Cong. & Ad. News 54, 84.

5. Under Washington law, one who marries a noncustodial parent with a child-support obligation is not responsible for the new spouse's support obligation. Van Dyke v. Thompson, 95 Wn.2d 726, 630 P.2d 420 (1981). The district court permitted plaintiff to represent a class defined as follows: "all residents of the State of Washington (1) who have filed joint Federal income tax returns for 1981; (2) whose spouses owe money to the State of Washington for child support; and (3) who were

in the District Court, but before the case was decided) the Secretary changed his position and agreed to recognize that a husband's debt could only be collected from his 50% interest in community property, and that the non-debtor spouse was entitled to the remaining 50% of what the IRS owed the couple. How community income should be treated is no longer in dispute between the parties.

The District Court ruled that, as a matter of due process, the Secretary was obligated to notify affected class members of their right to their 50% community share. It subsequently ordered the Secretary to give such notice when he declined

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entitled to a refund of taxes withheld, not exclusively from their spouses' earnings, or to an earned income credit, all or part of which has been withheld by the Internal Revenue Service under the authority of 26 U.S.C. § 6402 or 42 U.S.C. § 664." 557 F. Supp. at 733, reprinted in the appendix to this petition at A-39.

to do so voluntarily. The Secretary did not appeal the District Court's resolution of the merits of the due process issue, but he appealed from the District Court's judgment on jurisdictional grounds.

The remaining issue addressed by the District Court, and the issue with respect to which review is sought in this Court, relates to the treatment of earned income credit benefits. Plaintiff contends that the intercept law does not authorize the taking of earned income credit benefits. The District Court ruled that it does. Plaintiff appealed from this ruling.

The Court of Appeals affirmed the District Court's judgment on all issues. It held that there was Federal question jurisdiction under 28 U.S.C. § 1331 over the class claims for injunctive and declaratory relief, and that sovereign immunity with respect to those claims was

waived under 5 U.S.C. § 702. It held that there was jurisdiction over plaintiff's individual refund claim under 28 U.S.C. 1346(a)(1). On the merits, it held that the intercept law could be applied to earned income credit benefits.

## Why the Writ Should Be Granted

This Court should review the decision of the Court of Appeals because the decision is in direct conflict with decisions of courts of appeals in two circuits, namely, Nelson v. Regan, 731 F.2d 105 (2d Cir.), cert. denied, ___ U.S. ___, 83 L. Ed. 2d 110, 105 S. Ct. 175 (1984), and Rucker v. Secretary of the Treasury, 751 F.2d 351 (10th Cir. 1984). See Sup. Ct. R. 17.1. The issue is one of construction of a Federal statute. The conflicting decisions demonstrate the ambiguity of the

intercept law, and the need for a definitive construction of the law by this Court. The Secretary of the Treasury is currently required to take earned income credit benefits in the Ninth Circuit and prohibited from taking them in the Second and Tenth Circuits. The number of people affected by this inconsistent governmental action is large.[6]

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6. The Memorandum for the Federal Respondents submitted by the Solicitor General in response to a petition for certiorari filed in this Court by a state official in Nelson v. Regan (No. 84-33) contained the following estimate at p. 7 n. 6: "The number of interceptions effected by the IRS is substantial and is increasing each year. We are informed by the IRS that the total annual number of interceptions (rounded to the nearest thousand) for 1982, 1983, and 1984 (through June 25, 1984) were 273,000, 340,000, and 392,000 respectively. We have been further informed that approximately 20% of these intercepted refunds involve an EIC component.

The Omnibus Budget Reconciliation Act of 1981, in which the intercept law was § 2331, was an unprecedented legislative event in recent history.[7] The Act itself occupies 576 pages in the United States Statutes at Large. The provisions at issue here were far from the focus of Congressional attention, and so far as counsel have been able to determine, no member of Congress ever considered the taking of earned income credit benefits in connection with § 2331. It is prudent to

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7. There was a controversy in the summer of 1981 over whether the Administration's "budget" would be considered item by item or as a package. The proponents of the latter approach prevailed. "What followed . . . was the approval of a momentous . . . turn in American public policy before most of the House had even a skimming acquaintance with what it was voting on. The bill that reached the Hill . . . was a 1½-inch stack of unnumbered and pencil-tracked pages, thrown together so hastily that the name and phone number of a woman budget analyst survived forgotten in the fine print." Newsweek, July 6, 1981, p. 20.

construe such a provision narrowly, and to refrain from reading into it authority that its plain language does not justify.

The Second and the Tenth Circuits construed the intercept law narrowly, holding that it applied only to "refunds of Federal taxes paid" and not to earned income credit benefits. Nelson, supra at 110-112 (Appendix at A-76 through A-84); Rucker, supra at 356-57 (Appendix at A-68 through A-75). The Ninth Circuit construed the law broadly to authorize the interception of earned income credit benefits. 752 F.2d at 1440-44 (Appendix at 14-21).

The reading adopted by the Ninth Circuit is neither warranted nor required by the language of the intercept law.[8] Furthermore, it is not consistent with any

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8. The detailed analysis required to fully support this contention is beyond the scope of this petition.

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A writ of certiorari

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April 1985

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# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

MARIE D. SORENSON, individually and on behalf of all others similarly situated,
*Plaintiff-Appellant,*

v.

THE SECRETARY OF THE TREASURY OF THE UNITED STATES; and THE UNITED STATES OF AMERICA,
*Defendants-Appellees.*

No. 83-3694
83-3702

D.C. No.
CV 82-441C

OPINION

Argued and Submitted February 10, 1984

Filed February 5, 1985

Appeal from the United States District Court
for the Western District of Washington
The Honorable John C. Coughenour, Presiding

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## SUMMARY

The earned income credit is subject to the intercept program, which allows the Internal Revenue Service (IRS) to transfer tax refunds of parents owing delinquent child support payments to the state. [1]

Plaintiff's husband was indebted to the state due to his failure to make the required child support payments to his children of a prior marriage. When Plaintiff and her husband filed their joint tax return, the IRS withheld payment of the refund in order to credit it against the husband's child support obligation. After failing to obtain a refund from IRS, Plaintiff filed this complaint. The district court held that one-half of the refund could be re-

tained under community property law. The district court, which had granted Plaintiff's motion for certification of a class, also held that the members of the class must be notified of their legal right to a refund. Plaintiff appealed the district court's decision that earned income credits were tax refunds and so were subject to retention. Defendants cross-appealed, raising several jurisdictional and procedural issues.

Subject matter jurisdiction is not limited by 26 U.S.C. § 6305(b) because the newer new tax intercept system differs in operation from the old assessment method of collection. Unlike the assessment method, which involves the collection of the amount certified, the intercept method involves the transfer of funds already in the possession of the government and already owed to the taxpayer. [2] The federal tax exception to the Declaratory Judgment Act does not apply because the issue here is not of tax liability but of the disposition of funds owed to Plaintiff. [3] Since Plaintiff now characterizes her individual action as a tax refund suit and no longer seeks an order requesting that funds be released to the plaintiff class, it is not necessary to decide if a tax refund suit provides an adequate legal remedy that would preclude an injunction. [4] The doctrine of sovereign immunity does not bar this suit because Plaintiff complied with the necessary procedural requirements. In applying 26 U.S.C. § 6532(a)(1), prescribing the proper time to file a suit against IRS, it is the time of the decision to deny a refund, not the time of actual notification, that is controlling. [5] Since Plaintiff no longer seeks a class-wide refund, but only declaratory and injunctive relief, class certification was proper. [6] The earned income credit may be withheld and transferred to the state to satisfy child support obligations because statutes provide that *any* overpayment, including the earned income credit, payable *as a refund* is subject to retention. [7] Since the intercept program applies to any overpayment and the earned income credit has not been expressly excluded by Congress, the Court will not speculate as to Congress' intention. [8]

Affirmed.

## COUNSEL

Evergreen Legal Services and Peter Greenfield, Seattle, Washington, for the plaintiff-appellant.

Richard Farber and Jo-Ann Horn, Department of Justice, Washington, D.C., for the defendants-appellees.

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## OPINION

Before: WRIGHT and HUG, Circuit Judges, and EAST,* District Judge.

HUG, Circuit Judge

This appeal involves a challenge to the manner in which the Secretary of the Treasury has implemented the "tax intercept" program. The tax intercept program authorizes the Secretary to withhold tax refunds owed to parents who have delinquent child support obligations and to transfer those funds directly to the states as reimbursement for expenditures made by the states to support the affected children under the Aid to Families with Dependent Children (AFDC) Program.

Sorenson brought this action on behalf of herself and a class of similarly situated persons, seeking a declaratory judgment, an injunction, and refunds of amounts alleged to be wrongfully withheld. The district judge certified the class, entered a declaratory judgment, and later an injunction requiring certain notice to be provided to the class. The district judge denied a refund to Sorenson and the class. Sorenson appeals and the Secretary cross appeals.

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*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

## FACTS

Sorenson is a married woman who lives in the State of Washington. Her husband is indebted to the State for his failure to make the required child support payments to the children of his prior marriage. When the State gave financial assistance to his former wife, the State took an assignment of the past due child support, as it is required to do under the AFDC program. In February, 1982, Sorenson and her husband filed a joint 1981 federal income tax return. All of the income was from Sorenson's wages and unemployment benefits. Sorenson and her husband were to receive a tax refund of $1,408, consisting of excess withheld wages and an earned income credit.

Sorenson did not, however, receive her expected refund. The Internal Revenue Service ("IRS") withheld payment of the refund so that it could be offset against the amount owed to the State of Washington because of her husband's nonpayment of child support. After unsuccessfully trying to obtain her refund from the local office of the IRS and from the Washington State Department of Social and Health Services, to which the IRS referred her, Sorenson filed a complaint in the present action on April 22, 1982. Sorenson sought, among other forms of relief, (1) leave to proceed on behalf of a class, (2) a declaration that the tax intercept statutes do not apply to earned income credits, (3) a declaration that the tax intercept statutes do not authorize the taking of funds withheld from community earnings except from funds withheld from the earnings of an individual having a child support obligation to a state, (4) a declaration that the taking by the IRS of money due to married taxpayers to satisfy child support claims against one spouse constitutes taking of property without due process, and (5) an order requiring that the money owed to class members as refunds or earned income credits and held on the basis of the tax intercept statutes be released to class members.

The Secretary moved to dismiss Sorenson's suit on the grounds that the district court lacked subject matter jurisdiction, that the action was barred by sovereign immunity, and that several proce-

dural limitations pertaining to tax suits precluded the court from granting the relief requested. That motion was denied. Sorenson moved for certification of a class, and that motion was granted. Both parties moved for summary judgment on the substantive issues. The Secretary had originally taken the position that, under Washington community property law, all of the overpayment of tax resulting from the income of Sorenson's husband and one-half of the overpayment resulting from Sorenson's income was to be retained and paid over to the State of Washington for payment of Sorenson's husband's child support obligation. The Secretary later clarified his policy and claimed only one-half of the total community property overpayment. Sorenson contended that, under Washington community property law, it was unlawful for the Secretary to retain and transfer the remaining one-half of the refund resulting from her earnings and that it was contrary to federal law to retain and transfer the remaining one-half of the earned income credit due to her or her husband.

The district court held that, under Washington community property law, the Secretary could properly retain and transfer to the State one-half of the refund resulting from Sorenson's earnings, but that due process required the Secretary to notify other class members that he could only retain one-half of the community property overpayment and, thus, of their legal right to a refund in the instances when more had been retained. The district court further held that the earned income credits were tax refunds within the scope of the intercept statutes and thus could be retained and transferred to the State.

## ISSUES

A number of issues were resolved in the district court and are not contested on appeal. We refer to the thorough and carefully written opinion of the district court concerning these issues. *See Sorenson v. Secretary of the Treasury of the United States,* 557 F.Supp. 729 (W.D.Wash. 1982). Our focus in this appeal is only on those issues now raised by the parties.

There is only one issue involved in Sorenson's appeal on behalf of herself and the class certified by the district court. The issue

is whether any of the earned income credit authorized under the provisions of the Internal Revenue Code, 26 U.S.C. § 43 (1982), may be intercepted in the same way as overpayments of taxes that are due to the taxpayer.

In the cross appeal, the Secretary raises several issues. The Secretary contends that:

1. The federal court lacks subject matter jurisdiction to review matters concerning the tax intercept system because judicial review is precluded by 26 U.S.C. § 6305(b),

2. Declaratory relief granted to the class was improper because the Declaratory Judgment Act expressly prohibits granting such relief with respect to Federal taxes,

3. Injunctive relief granted to the class was improper because the Anti-Injunction Act prohibits restraining the assessment or collection of a tax,

4. The doctrine of sovereign immunity precludes the refund Sorenson seeks because she failed to follow the prescribed procedural requirements, and

5. The class certification was improper.

## CROSS APPEAL

We discuss first the issues raised on the cross appeal, because these issues involve jurisdictional matters or matters that would otherwise be dispositive of Sorenson's claims.

## SUBJECT MATTER JURISDICTION

### Section 6305(b)

The Secretary contends that pursuant to 26 U.S.C. § 6305(b) (1982) the federal courts are without jurisdiction to review mat-

ters concerning the tax intercept system. We disagree. The Secretary fails to distinguish between two separate statutory schemes by which he is authorized to collect delinquent child support payments to reimburse the states.

There is an older system of collection, under which the Secretary of the Department of Health, Education, and Welfare is authorized, upon the request of a state, to certify to the Secretary of the Treasury the amount of any child support obligation assigned to that state. *See* 42 U.S.C. § 652(b). Parents are required, as a condition of eligibility for welfare, to assign their rights to support payments to the state, and the support obligation thereby becomes a debt owed by the obligated parent to the state. The Secretary of the Treasury is then required to assess and collect the amount certified "in the same manner and with the same powers, and . . . subject to the same limitations as if such amount were a tax. . . ." 26 U.S.C. § 6305(a). This method is hereafter referred to as the "assessment" method of collection.

The second method of collection, and the one at issue here, is the "intercept" method. This scheme also is triggered by the Secretary of the Treasury receiving notice from a state that an individual owes past-due support that has been assigned to the state as a condition of welfare eligibility. The Secretary then determine as whether any amounts are payable to that individual as refunds of federal taxes paid, and he is then authorized to withhold from such refunds an amount equal to the past-due support and to pay that money directly to the state agency to which it is owed. *See* 26 U.S.C. § 6402(c) and 42 U.S.C. § 664. Unlike the "assesssment" method, the "intercept" method involves the transfer of funds already in the possession of the Government and undisputedly already owed to the taxpayer as a refund.

Section 6305(b) provides that

> [n]o court of the United States . . . shall have jurisdiction of any action, whether legal or equitable, brought to restrain or review the assessment and collection of amounts by the Secretary under subsection (a), nor

> shall any such assessment and collection be subject to review by the Secretary in any proceeding.

26 U.S.C. § 6305(b). The question arises whether this limitation upon federal jurisdiction with respect to the "assessment" method of collection applies also to the "intercept" method at issue in the present case. We hold that it does not. [2]

The "assessment" and "intercept" methods of collection are similar in purpose but not in operation. The very acts upon which section 6305(a) pivots—assessment and collection—have no part in the "intercept" method; and it is precisely these pivotal actions that section 6305(b) shields from federal judicial interference. *See Marcello v. Regan,* 574 F.Supp. 586, 592-94 (D.R.I. 1983). Further, although section 6305(a) was slightly amended in 1981 by the same act of Congress that created the new "intercept" program, Congress did not amend section 6305(b) to refer to the new program. On the contrary, the legislative history of the tax intercept statutes makes only fleeting reference to the "assessment" method, stating merely that the intercept program "amplifies" the Secretary's already existing authority under section 6305(a). H.R. Con. Rep. No. 208, 97th Cong., 1st Sess. 35, *reprinted in* 1981 U.S. Code Cong. & Ad. News 1010, 1347. This reference is no support for the Secretary's contention. The limitation on jurisdiction created by section 6305(b) refers only to "assessment and collection of amounts by the Secretary under subsection (a)" and not to the transfer under section 6402(c) of funds already collected and owed to the taxpayer as a refund.

*Declaratory Relief*

The Declaratory Judgment Act, 28 U.S.C. § 2201 (1982), authorizes a federal court to grant declaratory relief in a case of actual controversy within its jurisdiction, whether or not further relief is or could be sought. However, the Act expressly prohibits the granting of such relief "with respect to federal taxes." The question in the present case is whether the declaratory relief sought by petitioner is relief "with respect to federal taxes." The district court held that it was not, and we agree. [3]

There was no question in this case with respect to Sorenson's federal tax liability. The question rather concerned the disposition of funds that the Secretary had determined were owed to Sorenson as a refund of taxes withheld and an earned income credit. It was only because the funds were undisputedly owed to petitioner and undisputedly not owed to the United States as taxes that the Secretary proposed to transfer them to the State of Washington.

As this court stated in *State of California v. Regan*, 641 F.2d 721, 722 (9th Cir. 1981),

> [t]he purpose of the federal tax exception to the Declaratory Judgment Act is to protect the government's ability to assess and collect taxes free from pre-enforcement judicial interference, and to require that disputes be resolved in a suit for refund.

(Citation omitted.) The present suit would not interfere with the assessment and collection activities of the IRS since those activities have been completed. We see no reason, therefore, why the federal tax exception to the Declaratory Judgment Act should be applied here.

Injunctive Relief

The district court held that the Anti-Injunction Act, 26 U.S.C. § 7421(a) (1982), which prohibits suits "for the purpose of restraining the assessment or collection of any tax," was inapplicable to the present case. The Secretary does not appeal this ruling but contends instead that injunctive relief was improper because Sorenson had an adequate remedy at law, namely a tax refund suit.

The only injunctive relief granted by the district court was an order requiring the Secretary to notify class members of their right to one-half of the community property overpayment. The court issued a declaratory judgment that class members had a due process right to such notice; and when the Secretary failed to

act on this declaration, the district court ordered him to do so. The Secretary apparently does not seek review of this order, and the district court was correct in any case. Under the circumstances, a tax refund suit would not provide an adequate remedy for a class of plaintiffs who have virtually no means of discovering that they are entitled to such a refund.

Petitioner no longer seeks an order requiring the Secretary to release funds to the plaintiff class, and she now characterizes her individual action as a tax refund suit. This court therefore need not rule on whether a tax refund suit provides an adequate legal remedy that would preclude a court from ordering the Secretary to release the intercepted refunds to the class. [4]

## SOVEREIGN IMMUNITY

The Secretary contends that the doctrine of sovereign immunity bars Sorenson's individual refund action on the grounds that she failed to meet the procedural requirements of 26 U.S.C. §§ 6532(a)(1) and 7422(a) (1982). The latter section of the Tax Code provides that no suit may be maintained for the recovery of any internal revenue tax until a claim for a refund has been duly filed with the IRS. The former section prohibits the courts from entertaining any refund suit filed before the expiration of six months from the date the claim for refund is filed, unless the Secretary renders a decision on the claim within that time. Any refund suit instituted prior to the filing of a claim for refund, or after the claim has been filed but prior to the time specified by section 6532, is outside the scope of the Government's consent to be sued and is barred by sovereign immunity. *See, e.g., United States v. Freedman,* 444 F.2d 1387, 1388 (9th Cir.), *cert. denied,* 404 U.S. 992 (1971).

The district court held that "this is not a tax refund suit" and that "sovereign immunity is waived under 5 U.S.C. § 702." *Sorenson,* 557 F.Supp. at 733. Petitioner, however, has recharacterized the relief she seeks. She now concedes that her individual action is a tax refund suit, and she no longer seeks an order requiring the Secretary to release funds to the class. She further

concedes that section 702 does not apply beacause it provides for a waiver of sovereign immunity only in actions seeking relief other than money damages. Since the district court did not regard the present action as a tax refund suit, it did not rule on whether sovereign immunity would bar such a suit. Because we hold that Sorenson's individual action is a tax refund suit, we must reach the question of sovereign immunity.

With respect to the requirement of section 7422(a) that a claim for a refund or credit be filed with the IRS, tax regulations provided that "[a] properly executed . . . income tax return (on 1040X . . .) . . . shall constitute a claim for refund or credit. . . ." 26 C.F.R. § 301.6402-3(a)(5). Sorenson filed such a return in February of 1982. Further, on April 14, 1982, her counsel mailed a letter to the IRS that reiterated her claim that she was entitled to a refund and credit. Since even "an informal claim which fairly gives notice of a taxpayer's intention to press for a refund of taxes is sufficient to satisfy the statutory requirement," *Standard Lime and Cement Co. v. United States,* 329 F.2d 939, 943 (Ct. Cl. 1964); *Rosengarten v. United States,* 181 F.Supp. 275 (Ct. Cl.), *cert. denied,* 364 U.S. 822 (1960), the letter, as well as the filing of Form 1040X, satisfied the claim requirement of section 7422(a).

The provision of section 6532 that a taxpayer may not file a refund action in the courts "before the expiration of 6 months from the date of filing the claim . . . unless the Secretary . . . renders a decision thereon within that time . . . ," 26 U.S.C. § 6532(a)(1), presents a more difficult question. Sorenson's uncontroverted complaint alleges that on April 12, 1982, an IRS representative told her that her refund and credit were being held to satisfy the State of Washington's claim against her husband. Further, on April 22, 1982, the same day that Sorenson filed her complaint in this suit, the Secretary sent her notice that "we have kept all or part of your overpayment" and that the "amount we kept has been paid to the State of Washington." Sorenson contends that either of these communications constituted adequate evidence that the Secretary had rendered an adverse decision on her claim and that she was thereafter entitled to file suit for a refund. The

IRS argues that these exchanges do not constitute notice, that the Secretary had not rendered a decision by April 22, 1982, and that a formal notice of disallowance was not sent to petitioner until June 28, 1982, over two months after she filed suit.

Section 6532(a)(1) provides:

> No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary or his delegate renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary or his delegate to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

The first portion of the statute sets forth a time *before* which a suit cannot be filed and the latter portion a time *after* which a suit cannot be filed. It is obvious that there are different policy considerations for each requirement. The first portion of section 6532 establishes a six-month period as a reasonable time for the IRS to consider the claim before suit is filed, so that those claims it considers to have merit can be resolved administratively, thereby avoiding needless litigation. However, under the provisions of this section, a suit is not precluded if the IRS renders a *decision* on the claim within that period. The section does not say that suit is precluded until *notice* of that decision is given to the taxpayer. Rather, it is the time of the *decision* that is controlling. [5] This is perfectly logical, in that the purpose of this portion of the statute is served if no suit is filed before the Secretary has made his decision or the six months' reasonable time for doing so has expired. Notice to the taxpayer has no bearing on the policy reasons for this portion of the statute.

The remainder of section 6532 provides for a period of limitations within which the taxpayer must bring his suit. In order for this time period to commence, the latter portion of the statute

provides that the Secretary must mail a notice of the decision by certified or registered mail. It is obvious that basic fairness to the taxpayer requires that he be notified of the time from which his two-year limitations period commences to run.

In the present case, the IRS letter of April 22 to Sorenson stated that all or part of her refund had been withheld and transferred to the State of Washington. This constituted a decision on the claim, which permitted her to file suit to recover the amount withheld and transferred to the State.

## CLASS CERTIFICATION

Pursuant to Fed. R. Civ. P. 23(b)(2), the district court certified a class consisting of

> all residents of the State of Washington (1) who have filed joint Federal income tax returns for 1981; (2) whose spouses owe money to the State of Washington for child support; and (3) who were entitled to a refund of taxes withheld, not exclusively from their spouses' earnings, or to an earned income credit, all or part of which has been withheld by the Internal Revenue Service under the authority of 26 U.S.C. § 6402 or 42 U.S.C. § 664.

557 F.Supp. at 733. The court ruled that the requirements of Rule 23(a) had been met and that class-wide declaratory and injunctive relief would be appropriate. *Id.* The Secretary argues that such a class cannot be certified because it is impossible to determine which of the class members, if any, have met the procedural requirements for the maintenance of a tax refund suit. Sovereign immunity would bar refund actions by any class members who had not met the requirements. Sorenson, however, no longer seeks a class-wide refund. The only relief she seeks on behalf of the class is declaratory and injunctive. All class members are entitled to seek such relief because, pursuant to 5 U.S.C. § 702, sovereign immunity is waived with respect to declaratory and injunctive relief. Whether class members individually have met the

procedural requirements for a refund action is therefore irrelevant, and certification of the class was proper. [6]

## SORENSON'S APPEAL

Sorenson sought a declaratory judgment on behalf of herself and the class declaring that "earned income credits" authorized by 26 U.S.C. § 43 are not within the purview of 42 U.S.C. § 664(a) (1982) and 26 U.S.C. § 6402(c) (1982) and are, therefore, not subject to retention by the Secretary and transfer to the states as reimbursement for public assistance payments. Sorenson also sought refund of the remaining one-half of the earned income credit withheld in her case. The district court held for the Secretary. We affirm.

A discussion of the related and underlying code sections is necessary in order to place in perspective the legislation here in question.

### *Statutory Background*

The Social Security Act requires that, as a condition of eligibility to receive aid to families with dependent children, the applicant or recipient must assign to the state any rights to support from any other person which have accrued at that time. *See* 42 U.S.C. § 602(a)(26) (1982). Congress enacted the Social Services Amendments of 1974, which amended the Social Security Act and the Internal Revenue Code so as to provide a mechanism to assist the state in collecting these support obligations. Under this statute, the state can certify the amount of a child support obligation that has been assigned to the state and the Secretary of the Treasury will then proceed to assess and collect the obligation for the state in the same manner (with some exceptions) as federal taxes. Social Services Amendments, Pub.L. No. 93-647 §§ 452(b) and 460(b)(1) (1975), 88 Stat. 2337, 2352 and 2358 (42 U.S.C. § 652(b) and 26 U.S.C., § 6305). This procedure does not, however, authorize the Secretary to withhold and transfer to the state any funds held as refunds of federal taxes paid and due to the parent owing the child support. In order to remedy this de-

ficiency, Congress enacted additional amendments to the Social Security Act and the Internal Revenue Code as a part of the Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub.L. No. 97-35, 95 Stat. 357, 860-63 (1981). These amendments, which establish such a procedure, are the statutes here in issue. Section 2331(a) of OBRA amended the Social Security Act by adding a new section, 464(a), codified as 42 U.S.C. § 664. Section 2331(c) amended the Internal Revenue Code by amending 26 U.S.C. § 6402(a) and adding a new section, 26 U.S.C. § 6402(c). The specific provisions of these sections of OBRA are:

> Sec. 464.(a) Upon receiving notice from a State agency administering a plan approved under this part that a named individual owes past-due support which has been assigned to such State pursuant to section 402(a)(26), *the Secretary of the Treasury shall determine whether any amounts, as refunds of Federal taxes paid, are payable to such individual* (regardless of whether such individual filed a tax return as a married or unmarried individual). If the Secretary of the Treasury finds that any such amount is payable, he shall withhold from such funds an amount equal to the past-due support, and pay such amount to the State agency (together with notice of the individual's home address) for distribution in accordance with section 457(b)(3). (Emphasis added.)
>
> Sec. 464(c) Section 6402 of the Internal Revenue Code of 1954 is amended-
>
> (1) by striking out in subsection (a) thereof "shall refund" and inserting in lieu thereof "shall, subject to subsection (c), refunds"; and
>
> (2) by adding at the end thereof the following new subsection: "(c) OFFSET OF PAST-DUE SUPPORT AGAINST OVERPAYMENTS.—The amount of any *overpayment to be refunded to the person making the overpayment* shall be reduced by the amount of any

> past-due support (as defined in section 464(c) of the Social Security Act) owed by that person of which the Secretary has been notified by a State in accordance with section 464 of the Social Security Act. The Secretary shall remit the amount by which the overpayment is so reduced to the State to which such support has been assigned and notify the person making the overpayment that so much of the overpayment as was necessary to satisfy his obligation for past-due support has been paid to the State. This subsection shall be applied to an overpayment prior to its being credited to a person's future liability for an internal revenue tax." (Emphasis added.)

Sorenson argues that these amendments do not authorize the retention and transfer of amounts held as an "earned income credit" because an earned income credit is in the nature of a grant of funds to the recipient through the refund mechanism of the Internal Revenue Code but is not a "refund of Federal taxes paid," specified in section 2331(a), or an "overpayment to be refunded to the person making the overpayment," specified in section 2331(c).

Looking first at the wording of section 2331(a), it is important to note that it does not provide, as Sorenson contends, that only *tax refunds* being held by the Secretary can be retained and transferred. Rather, section 2331(a) provides that "any" amounts payable "as" refunds of federal taxes paid may be retained and transferred. This language does include the earned income credit because it is payable "*as* a refund of Federal taxes paid." The mechanism used for the refund of Federal taxes paid is the method by which the earned income credit is paid. This language of section 2331(a) supports the construction urged by the Secretary, not by Sorenson.

We next turn to the construction of section 2331(c). The language of this section is best understood when placed in the context of the pertinent Internal Revenue Code provisions, 26 U.S.C. §§ 6401 and 6402, which provide in relevant part:

§ 6401 *Amounts treated as overpayments* . . .

(b) Excessive credits.—If the amount allowable as credits under sections 31 (relating to tax withheld on wages) and 39 (relating to certain uses of gasoline, special fuels, and lubricating oil), *and 43 (relating to earned income credit)* exceeds the tax imposed by subtitle A (reduced by the credits allowable under subpart A of part IV of subchapter A of chapter 1, other than the credits allowable under sections 31, 39, and 43), *the amount of such excess shall be considered an overpayment* . . . .

(c) Rule where no tax liability.—An amount paid as tax shall not be considered not to constitute an overpayment solely by rerason of the fact that there was no tax liability in respect of which such amount was paid.

§ 6402. *Authority to make credits or refunds*

(a) General rule.—In the case of any overpayment, the Secretary or his delegate, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of any internal revenue tax on the part of *the person who made the overpayment* and shall, subject to subsection (c), *refund any balance to such person.*

(b) Credits against estimated tax.—The Secretary is authorized to prescribe regulations providing for the crediting against the estimated income tax for any taxable year of the amount determined by the taxpayer or the Secretary to be an overpayment of the income tax for a preceding taxable year.

(c) Offset of past-due support against overpayments.—The amount of *any overpayment to be refunded to the person making the overpayment* shall be re-

> duced by the amount of any past-due support (as defined in section 464(c) of the Social Security Act) owed by that person of which the Secretary has been notified by a State in accordance with section 464 of the Social Security Act. The Secretary shall remit the amount by which the overpayment is so reduced to the State to which such support has been assigned and notify the person making the overpayment that so much of the overpayment as was necessary to satisfy his obligation for past-due support has been paid to the State. This subsection shall be applied to an overpayment prior to its being credited to a person's future liability for an internal revenue tax. (Emphasis added.)

Section 6401(b) defines an overpayment and clearly classifies an "earned income credit" as an "overpayment." Section 6402 authorizes the Secretary to dispose of the overpayment. He can, under section 6402(a), credit it against any liability for internal revenue taxes due the federal government on the part of the person who made the overpayment and must refund the balance to that person who made the overpayment unless it is retained for past due support under subsection (c). [7] It is important to note that the only person to whom the Secretary is authorized to refund an overpayment is "the person who made the overpayment."

Section 6402(c) provides that the amount of "*any overpayment to be refunded to the person making the overpayment*" shall be reduced by the amount of any past-due support owed, which is then remitted to the state. Sorenson contends that although the earned income credit is an "overpayment," it is only the type of overpayment that is "*to be refunded to the person making the overpayment*" that can be retained and transferred. This interpretation of the language does not comport with the remainder of the provisions of sections 6401 and 6402. This language in section 6402(c) is the same language used in section 6402(a). If we were to apply Sorenson's construction of the language to section 6402(a), the earned income credit would never be payable at all because no one ever technically made an overpayment. Obviously

the person who is entitled to the payment in either section 6402(a) or (c) is the person considered to have made the overpayment. The reason for the awkwardness of the overpayment language is that a credit really is not an "overpayment," as the term is used in normal usage but, for the purposes of this statutory method of distribution, it is defined as an overpayment and treated as a refund of taxes that have been overpaid. Similarly, the person who receives any credit enumerated in section 6401(b) has not really overpaid it; yet, he or she is the person who is entitled to receive it and is thus considered to be the person who paid it.

It is significant to note that rather than providing any exclusionary language for the earned income credit, Congress provided in the statutory section amending the Social Security Act that the interception applied to "any" amounts payable as tax refunds, OBRA § 2331(a). Furthermore, in the section of the statute amending the Internal Revenue Code, Congress provided that the interception applied to "any" overpayments, OBRA § 2331(c).

It is also significant that an employee can elect to receive the earned income credit from his employer during the course of the year as a negative withholding. *See* 26 U.S.C. § 3507 (1982). Thus, if the employee does not claim it in this fashion, it could be viewed that he has "overpaid" it, in the same sense that in not claiming all his exemptions he has "overpaid" his withholding tax. Technically, in either case, it is the employer, not the employee, who has made the overpayment.

Sorenson argues that the earned income credit should be treated differently because it was really designed by Congress as a grant to assist needy families, and that Congress did not intend that the intercept program apply to such a grant.[1] The first prob-

[1]Actually, it appears from the legislative history that although the earned income credit provides some assistance to needy families, it was not designed as a type of welfare grant, but as a work incentive program, by negating the disincentive of Social Security taxes. Social Security taxes apply to earnings received through wages or salaries, whereas they do not apply to funds received through

lem we have with this argument is that Congress easily could have expressly exempted the earned income credit and did not do so. Secondly, Congress specifically provided in the statute that the intercept program applied to "any" amounts payable through the federal tax refund process. In the face of this rather clear statutory mandate, we conclude that we are not free to speculate that Congress intended otherwise. [8]

We are aware that the published opinions of several courts have reached conflicting conclusions on this issue. *See Rucker v. United States,* No. 83-1804 (10th Cir., Dec. 28, 1984) (earned income credit could not be intercepted); *Nelson v. Regan,* 731 F.2d 105 (2d Cir.) *cert. denied,* _ U.S. _, 105 S.Ct. 175 (1984) (earned income credit could not be intercepted); *Coughlin v. Regan,* 584 F.Supp. 697 (D.Maine 1984) (earned income credit could be intercepted); *Sorenson v. Secretary of the Treasury of the United States,* 557 F.Supp. 729 (D.Wash. 1982) (earned income credit could be intercepted). We believe that the *Nelson* and *Rucker* opinions have misinterpreted the statute by overlook-

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other sources, such as social welfare programs. The purpose of the legislation was to remove the disincentive to work provided by the Social Security taxes that would have to be paid on wages or salaries. *See* S.Rep. No. 36, 94th Cong. 1st Sess. 12, *reprinted in* 1975 U.S. Code Cong. & Ad. News, 54, 63-64, 83-84. It is also obvious from the manner in which the earned income credit operates that it was not a type of welfare grant. The wage earner is entitled to receive an income credit of ten percent of his or her earnings up to $5,000. Thus, a person who earns $5,000 would receive a $500 credit, whereas a person who earns $1,000, and would probably be in greater need, would receive only a $100 credit. The funds that the Secretary would be reaching are in reality more akin to a refund of Social Security taxes than to a type of welfare grant.

From a policy standpoint, it is also worth noting that these funds that the Secretary would be reaching are a lump sum, accumulated through the year, which the taxpayer could have received through his employer under 26 U.S.C. § 3507. This is quite similar to excess withholding taxes that the taxpayer has allowed to accumulate, which clearly can be intercepted. The policy considerations are quite different in intercepting such accumulated year-end funds from the policy considerations in the garnishing of weekly wages that the employee is expecting to receive for current living expenses. In this latter instance, Congress has specifically provided for exemptions of certain amounts of wages and salaries from the assessment and collection process. *See* 26 U.S.C. §§ 6305(a) and 6334(d).

ing the fact that the statute provides that the Secretary can intercept not only tax refunds, but any amounts *payable as* tax refunds. Furthermore, we believe these opinions overlook the context in which the implementing amendment to the Internal Revenue Code fits, and that the same "overpayment" language is used in the amendment as is used in the section providing for refunds of any withholding taxes or credits to the taxpayer.

In summary, sections 651-675 of the Social Security Act provide for a comprehensive program to collect past-due child support. The Act passed in 1975 provided that the assessment process used for collecting income taxes could be used to collect the past-due child support. OBRA enhanced the collection power by permitting the Secretary to intercept any amounts payable as refunds of federal taxes paid. Nothing in the language of section 2331 of OBRA, which amended the Social Security Act, exempted or referred to the earned income credit. The portion of OBRA that provided the mechanism for intercepting these funds, section 6402(c) of the Internal Revenue Code, merely used the same terminology, "any overpayment to be refunded to the person making the overpayment," as is used in the other subsections in authorizing the refund of withholding taxes, earned income credits, and other credits to the person entitled to receive them. There is nothing in the language of OBRA or the legislative history of the earned income credit which would indicate that Congress intended that the earned income credit be treated differently than other funds that are classified as "overpayments" and paid as a tax refund. [1]

The judgment of the district court on both the Secretary's cross appeal and Sorenson's appeal is AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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| MARIE D. SORENSON,<br><br>Plaintiff,<br><br>vs.<br><br>THE SECRETARY OF THE TREASURY OF THE UNITED STATES, and THE UNITED STATES OF AMERICA,<br><br>Defendants. | CIVIL ACTION<br><br>NO. C84-441C<br><br>ORDER |

THIS MATTER comes on for consideration on plaintiff's motion to amend the Judgment entered on January 17, 1983. Although phrased a motion to amend the Judgment, plaintiff is, in reality, seeking a clarification of the Court's Order of December 28, 1982 and relief in excess of that Order. The Court finds that clarification is necessary and additional relief appropriate and therefore rules as follows:

(1) The class certified consists of all residents of the State of Washington (a) who filed joint federal income tax returns for 1981, and (b) whose spouses owe money to the State of Washington for child support, and (c) who were entitled to either a refund of taxes withheld, not exclusively from their spouses' earnings, or an earned income credit, part or all of which has been held by the Internal Revenue Service under the asserted authority of 42 U.S.C. § 664.

(2) Specific notice should be sent to all class members advising them of their rights to half of the community property overpayment and the procedures necessary to obtain their property.

(3) The parties are directed to confer as to the form of notice. If the parties are unable to agree as to the form of notice, they are at liberty to contact

the Court.

The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of record.

DATED this 9th day of March, 1983.

/s/ John C. Coughenour
John C. Coughenour
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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| MARIE D. SORENSON, | ) | CIVIL ACTION |
| | ) | |
| Plaintiff, | ) | NO. C82-441C |
| | ) | |
| vs. | ) | ORDER ON PENDING MOTIONS |
| | ) | |
| THE SECRETARY OF THE TREASURY OF THE UNITED STATES, and THE UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Defendants. | ) | |

Filed December 28, 1982

[Published at 557 F. Supp. 729]

Plaintiff challenges portions of the Omnibus Budget Reconciliation Act of 1981 which provides a new mechanism for the collection of delinquent child support payments. Under the Act, tax refunds owed to parents having delinquent child support obligations are instead transferred to the states to reimburse the states for expend-

itures they made to support the affected children under the Aid to Familes with Dependent Children ("AFDC") program. Plaintiff challenges these provisions to the extent they authorize the transfer of tax refunds created by her earnings.

FACTS

Plaintiff is a married woman who lives in the State of Washington. Her husband is indebted to the State of Washington for his failure to make required child support payments to the children of his prior marriage. In February of 1982, plaintiff and her husband filed a joint 1981 Federal income tax return. All the income reported was from plaintiff's wages and unemployment benefits. Plaintiff and her husband were to receive a tax refund of $1,408 consisting of excess withheld wages and an earned income credit.

Plaintiff did not, however, receive her expected refund. The Internal Revenue Service ("I.R.S.") withheld payment of the refund so that the refund could be offset against the amount owed Washington State because of her husband's nonpayment of child support. After unsuccessfully trying to obtain her refund from the local office of the I.R.S. and the Washington State Department of Social and Health Services, Office of Support Enforcement ("DSHS"), plaintiff instituted the present action on April 19, 1982. On April 22, the I.R.S. confirmed the information plaintiff received from the local office that all or part of her refund was being withheld to satisfy a past-due support obligation. On June 28, the I.R.S. sent plaintiff "legal notice" that her claim for refund was partially disallowed. Presumably pursuant to Washington community

property law, all of the overpayment of tax resulting from the income of plaintiff's husband and one-half of the overpayment resulting from plaintiff's income was to be retained and transferred to the State of Washington for the payment of plaintiff's husband's support obligation. Defendants later clarified their position, and only claimed one-half of the total community property overpayment.

ISSUES PRESENTED

Plaintiff objects to the retention of half of the tax refund resulting from her earnings and unemployment compensation. She has filed a motion for class certification and for summary judgment. Defendants have filed a motion to dismiss and a motion for summary judgment. The central issues raised by these motions are: (1) whether plaintiff's suit should

be characterized as one involving the collection or assessment of taxes and therefore subject to the legal impediments to suit applicable to tax actions; (2) whether plaintiff's husband has a property interest in his wife's earnings for the purposes of collection of his separate debt of child support; and (3) whether the procedures employed satisfy due process. These inquiries require an examination of the statutory scheme and the relationship between State property law and the collection of Federal taxes.

THE STATUTORY SCHEME

The collection of past-due support payments is a matter of private, State and Federal concern. While Congress believed that the basic responsibility for the collection of child support rested with the States, Congress did envision a more

active Federal role. See S. Rep. No. 93-156, 93rd Cong., 2nd Sess., reprinted in 1974 U.S. CODE CONG. & AD. NEWS 8133, 8150 (hereinafter referred to as "Senate Report"). Two schemes have been enacted for the Federal collection of child support.

Under the first and older system, the States are authorized to use the Federal income tax collection mechanism itself for collecting support payments. Senate Report at 8153. Upon request of a State with an approved State plan, the Secretary of the Department of Health, Education and Welfare is authorized to certify the amount of any child support obligation assigned to that State to the Secretary of the Treasury. 42 U.S.C. § 652(b). Parents, as a condition of eligibility for welfare, are required to assign their rights to support payments to the State

and to cooperate with the State in the securing of support payments from the obligated parent. Senate Report at 8152. The support obligation becomes a debt owed by the obligated parent to the State. Id. at 8153. Upon receiving certification from the Secretary of Health, Education and Welfare of the amount owed to the State by the obligated parent, the Secretary of the Treasury is required to assess and collect that amount "in the same manner, with the same powers, and (except as provided in this section) subject to the same limitations as if such amount were a tax. . . ." 26 U.S.C. § 6305(a). This collection mechanism was intended to be available only in cases in which the State could establish to the satisfaction of H.E.W. that it had made diligent efforts to collect the payments through other processes but without success. Senate

Report at 8153. This method is hereafter referred to as the "assessment" collection method.

The second Federal method of collection is the one presently under challenge. Upon receiving notice from a State child support agency that an individual owes past-due support which has been assigned to the State as a condition of AFDC eligibility, the Secretary of the Treasury is required to determine whether any amounts as refunds of Federal taxes paid are payable to that individual. If any refunds are owed, he is authorized to withhold from such refunds an amount equal to the past-due support. That money is to be paid directly to the State agency, together with notice of the taxpayer's current address. See Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, 95 Stat. 357, S. Rep. No. 97-139, 97th

Cong., 1st Sess., reprinted in 1981 U.S. CODE CONG. & AD. NEWS 396, 1347 (hereinafter referred to as "Committee Report"). See also 42 U.S.C. § 464 and 26 U.S.C. § 6402. Thus, unlike the prior system, these provisions authorize the interception and transfer of funds already in the possession of the government. This method is hereafter referred to as the "transfer" collection method.

THE CHARACTERIZATION QUESTION

The characterization of the plaintiff's claim is hotly contested by the parties. Defendants contend that this is a tax refund suit while plaintiff claims this is merely a collection case. The determination of the nature of the plaintiff's claim has a direct impact on the issues of subject matter jurisdiction, sovereign immunity, injunctive and declaratory relief and the propriety of the

maintenance of a class action.

Tax cases in the Federal courts are subject to strict procedural requirements. Suit cannot be begun for the recovery of any tax until six months have expired from the filing of the claim for refund, unless the Secretary of the Treasury disallows the claim within that time. 26 U.S.C. § 6532. See Davis v. Commissioner, 78-1 U.S.T.C. § 9355 (D.S.C. 1978). The six-month requirement may even be applicable if the Secretary subsequently denies the claim after plaintiff had begun suit. See Anderson v. I.R.S. District Director, 79-2 U.S.T.C. § 9519 (E.D. Wis. 1979). Another result in tax cases is that the United States and its officers have not consented to be sued for tax refund actions unless the procedural requirements have been satisfied. See 5 U.S.C. § 702 (sovereign immunity is not waived if another statute

expressly forbids the relief sought). Moreover, except in extremely limited situations, injunctive and declaratory relief are unavailable in the tax context. 26 U.S.C. § 7421(a) prohibits the bringing of suit for the purpose of restraining the assessment or collection of any tax. The Anti-Injunction Act has been given wide reading by the courts. See Bob Jones University v. Simon, 416 U.S. 725 (1974); Zimmer v. Connett, 640 F.2d 208 (9th Cir. 1981). The Declaratory Judgment Act contains a similar exception for suits with respect to Federal taxes. 28 U.S.C. § 2201. Finally, the above jurisdictional and procedural limitations, as well as the general nature of tax cases, would make class certification very problematic.

A support obligation is significantly different from a tax obligation. See Senate Report at 8153 ("support obliga-

tions are not a tax"). Defendants argue, however, that as plaintiff is seeking a return of her tax refund, she is subject to the procedural limitations of a tax refund suit. Moreover, the jurisdictional limitations of 26 U.S.C. § 6305(b) are allegedly applicable to plaintiff's claim. 26 U.S.C. § 6305(b) attempts to preclude the courts of the United States from retaining jurisdiction to review or restrain the Secretary of the Treasury from assessing or collecting amounts under the "assessment" collection method. Although § 6305 makes no reference to the "transfer" collection method under challenge in the present action, defendants rely on language found in the House Conference Report that indicates the second collection method "amplified" prior law. See Committee Report at 604. Finally, the Secretary of the Treasury's own reg-

ulations provide that the past-due support under the "transfer" collection method is to be collected by offset "as if it were a liability for tax imposed by the Internal Revenue Code." Temp. Reg. § 304.6402-1-(a)(1).

The Court must reject the defendant's contentions. First, there is nothing to suggest that the jurisdictional limitations of § 6305(b) are applicable to § 6402. The Treasury Regulations make clear the "[c]ollection by offset under section 6402(c) of this section is a collection procedure separate from the collection procedures provided by section 6305." A similar argument was rejected by the district court in Nelson v. Regan, No. N 82-173 (D. Conn., June 15, 1982) (order denying motion to dismiss). Second, the Court cannot agree with defendants that Congress intended that the assessment and

collection of past-due support obligatons be subject to the procedural limitations of a tax refund suit. Plaintiff is not seeking a tax refund in anything but a purely technical sense. The Internal Revenue Service has calculated the refund owing and that amount is not disputed. Unlike the "assessment" collection method, the Secretary of the Treasury under the "transfer" collection method does no more than retain and then pass on funds to the appropriate State agency. The Secretary does not determine the amount of past-due support owing nor collect any additional funds to satisfy the obligation. In other words, this is not a case where suit would interfere with the assessment and collection activities of the I.R.S. since those activities have already been completed. In fact, the Secretary of the Treasury refers individuals with questions about

the transfer to the local State agency. The Court must conclude that the procedural and jurisdictional limitations of tax refund actions are inapplicable to plaintiff's suit. If Congress wanted these limitations to be applicable to the "transfer" collection method, they would have more clearly demonstrated their intent. See 26 U.S.C. § 6305.

The defendant's motion to dismiss is therefore DENIED. The Court finds that this is not a tax refund suit, that the Anti-Injunction Act and the similar limitations in the Declaratory Judgment Act are inapplicable to the present action, that sovereign immunity is waived under 5 U.S.C. § 702, and that subject matter jurisdiction is found in 28 U.S.C. § 1331-(a).

The Court also finds that certification of plaintiff's proposed class is

appropriate. The class consists of all residents of the State of Washington (1) who have filed joint Federal income tax returns for 1981; (2) whose spouses owe money to the State of Washington for child support; and (3) who were entitled to a refund of taxes withheld, not exclusively from their spouses' earnings, or to an earned income credit, all or part of which has been withheld by the Internal Revenue Service under the authority of 26 U.S.C. § 6402 or 42 U.S.C. § 664. The requirements of Fed. R. Civ. P. 23(a) have been met. There are thousands of potential class members, there are common questions of law and fact, the claims of plaintiff are typical of the class, and plaintiff and her counsel will fairly and adequately protect the interests of the class. Moreover, as plaintiff is not seeking anything but injunctive and declaratory relief and as

defendants have employed their collection method uniformly throughout the class, final class-wide injunctive or declaratory relief is appropriate. Therefore, plaintiff's proposed class is certified pursuant to Fed. R. Civ. P. 23(b)(2).

Having dealt with defendants' procedural objections, the Court must reach the merits of plaintiff's suit.

EARNED INCOME CREDITS

Plaintiff's first claim concerns the language of the applicable statutes. 42 U.S.C. § 664 authorizes the Secretary of the Treasury to withhold "refunds of Federal taxes paid" and transfer these funds to the appropriate State agency to satisfy the debtor's support obligation. 26 U.S.C. § 6402(c) provides that the amount of any "overpayment to be refunded to the person making the overpayment" shall be

reduced by the amount of past-due support. Plaintiff contends that earned income credits are not refunds of Federal tax and are therefore outside of the scope of the statutes. Allowing the Secretary to reach earned income credits would allegedly frustrate the Congressional purpose of benefiting poor children and giving their parents an incentive to work. Finally, plaintiff contends that the term "overpayment" in § 6402(c) should be given its common sense meaning and that since earned income credits can be paid even if no Federal income tax is owed, the credits must have been excluded from the statutes.

Common sense is not, however, a useful guidepost in dealings with the Internal Revenue Code. Words with well-accepted meanings are often adapted by the Code into terms of very specific interpretation. "Overpayment" is a term of art. 26

U.S.C. § 6401(b) provides, in part, that if there are amounts allowable as credits under the earned income credit provisions in excess of Federal income taxes paid, then "the amount of such excess shall be considered an overpayment." It is perfectly consistent that Congress would consider the payments of past-due child support more important than the protection of an earned income credit. The Court finds that earned income credits are within the purview of the statutes and are subject to retention and transfer.

VAN DYKE AND THE WASHINGTON PROPERTY LAW

The impetus for the present lawsuit was the Washington Supreme Court's holding in Van Dyke v. Thompson, 95 Wn.2d 726, 630 P.2d 420 (1981). Plaintiff's husband in Van Dyke owed the State of Washington for past-due child support for children from a

prior marriage. He was unemployed and had no assets. Defendant Secretary of the Department of Social and Health Services served notice on plaintiff's employer to withhold and deliver to DSHS 25 percent of plaintiff's wages to satisfy her husband's obligation. Plaintiff filed suit seeking injunctive and declaratory relief. The Washington Supreme Court held that despite the fact that plaintiff's earnings were community property, they could not be used to satisfy the husband's separate debt. The court's prior holding in Fisch v. Marler, 1 Wn.2d 698, 97 P.2d 147 (1939), that only the earnings of the obligated spouse were subject to garnishment for past child support obligatons was reaffirmed. Plaintiff contends that just as DSHS could not reach the non-obligated spouse's earnings in Van Dyke, so, too, should the tax refund generated by plain-

tiff's earnings be protected from transfer by the Internal Revenue Service.

Defendants assert that Van Dyke is inapplicable. They argue that Van Dyke is limited to the collection of separate debts under State law. They claim the proper analysis is that State law only determines whether the obligated spouse has a property interest in the overpayment created by the earnings of the nonobligated spouse. This determination being made in the affirmative, Federal collection law, not subject to the holding of Van Dyke, provides that the husband's half interest in the tax refund is reachable.

The parties do not dispute that the source of property law is Washington law. Under Washington law, however, the nature of the husband's interest in the earnings of the plaintiff is in some dispute. RCW § 26.16.030 provides that all property not

acquired or owned as prescribed in RCW §§ 26.16.010 and .020 which is acquired after marriage by either husband or wife or both is community property. Separate property is limited to property owned by one of the spouses at the time of marriage or thereafter acquired by gift, devise or inheritance, and the rents, issues and profits thereof. RCW §§ 26.16.010 and .020. There is a presumption that all property obtained during marriage is community property. See Yesler v. Hochstettler, 4 Wash. 349, 30 Pac. 398 (1892). Under these statutes, plaintiff's husband would have a property interest in the tax refund since that refund would be community property.

The problem arises with the application of RCW § 26.16.200. The statute provides that:

> Neither husband or wife is liable for the debts or liabilities of

> the other incurred before marriage, nor for the separate debts of each other, nor is the rent or income of the separate property of either liable for the separate debts of the other: Provided, that the earnings and accumulations of the husband shall be available to the legal process of creditors for the satisfaction of debts incurred by him prior to the marriage, and the earnings and accumulations of the wife shall be available to the legal process of creditors for the satisfaction of debts incurred by her prior to marriage. For the purpose of this section neither the husband nor the wife shall be construed to have any interest in the earnings of the other: Provided Further, that no separate debt may be the basis of a claim against the earnings and accumulations of either a husband or wife unless the same is reduced to judgment within three years of the marriage of the parties.

The Washington legislature added the two provisos in 1969. Prior to 1969, and except in limited cases, Washington followed the marital bankruptcy rule. Immediately upon a debtor's marriage, a creditor lost the ability to enforce his

claim against the new marital community. Watters v. Doud, 92 Wn.2d 317, 322, 596 P.2d 280 (1979). The 1969 amendment with the addition of the provisos was meant "to alleviate the harsh effects of the previous law" and give the creditor three years in which to get payment of the debt or reduce the debt to judgment. Id. See Note, 45 Wash. L. Rev. 191 (1970). It seems clear that the amendment's purpose was to make more of the community assets available for separate creditors. See Cross, The Community Property Law in Washington, 49 Wash. L. Rev. 729, 829-30 (1974). What is not clear is the impact of the characterization of the property. In other words, what effect is to be given to the phrase "[no] interest in the earnings of the other"? Defendants contend that the nature of the tax refund is governed by RCW §§ 26.16.010-030 and that

the refund is, therefore, community property. Plaintiff seems to argue that while the tax refund may be community property for most purposes, for purposes of collection of a separate debt, the property is not community property.

Van Dyke did not address the characterization issue. Van Dyke is a collection case. It held that the earnings of a noncustodial, nonobligated spouse are not subject to the antenuptial obligation of child support. That Van Dyke did not address the issue is not surprising. In terms of State law, there would be no difference between a limitation of property subject to creditors and a determination that an individual did not have a property interest in a particular asset. Either determination would prohibit the creditor subject to State law from reaching the asset. The distinction, however, becomes

critical when Federal law comes into play.

The distinction was made in United States v. Overman, 424 F.2d 1142 (9th Cir. 1970). The issue in Overman was whether the United States could levy on community property to satisfy the separate tax obligation of one of the spouses. Defendants had argued that based on the pre-amended RCW § 26.16.200, the community property was immune from the husband's premarital debt. The Ninth Circuit held, however, that in order for the Government to reach the community property it was only necessary that the obligated spouse have a property interest in the asset. The court went on to hold that even if RCW § 26.16.200 created a limitation on the extent of ownership rights of the obligated spouse, it was of "no moment." If the taxpayer had a property interest in a particular asset, the Government could

reach it. Furthermore, the Government could cause the involuntary conversion of the entire asset, although they were limited to retaining the half interest in the asset of the obligated spouse. This comports with the defendants' actions in the present case where half of the tax refund is retained.

The Court finds that the analysis of Overman controls the characterization issue. Admittedly, the language of the first proviso in RCW § 26.16.200 is troublesome. Also, Overman specifically did not address the statutory amendments. See Overman, 424 F.2d at 1145, n.2. Still, it is undisputed that the tax refund is community property. The creditor limitation is not a matter of substantive property law but only serves to insulate property from the reach of creditors. Exempt status of property under State law

need not bind the Federal collector. See United States v. Mitchell, 403 U.S. 190 (1971); Broday v. United States, 455 F.2d 1097 (5th Cir. 1972). The Court cannot accept plaintiff's assertion of "limited status" property: community property for all purposes except for payment of separate debts.

Even assuming that RCW § 26.16.200 and Van Dyke need not bar defendants from retaining the tax refund, the question remains whether the Washington statute nonetheless precludes retention and transfer in light of Congressional intent. In other words, did Congress intend that property exemptions applicable to Washington State parties (such as Thompson in Van Dyke) be inapplicable to Federal parties?

26 U.S.C. § 6402(c) provides that the amount of any overpayment to be refunded

to the person making the overpayment is to be reduced by the amount of any past-due support owed by that person. Thus, two determinations must be made. First, is there a person who is owed an overpayment? Second, does that person owe past-due support? If so, then the Secretary of the Treasury is directed to reduce the amount of overpayment owed to that individual by the amount of the pastdue support. In our case, it is conceded that plaintiff's husband owes past-due support. Moreover, just as plaintiff's husband would be liable for Federal income taxes generated by plaintiff's community earnings, so, too, would he be entitled to the overpayment created by those community earnings. See Bagur v. Commissioner, 603 F.2d 491 (5th Cir. 1979); Simmons v. Cullen, 197 F. Supp. 179 (S.D. Cal. 1961). Cf. United States v. Merrill, 211 F.2d 297

(9th Cir. 1954). Plaintiff's husband would be owed the overpayment in the same manner as plaintiff. Therefore, retention of the husband's property interest in the overpayment generated by plaintiff's earnings is authorized under the literal language of the statute. Moreover, given the strong Federal policy favoring the collection of past-due support and the intent of Congress in the enactment of the "transfer" collection method to develop a collection method as an alternative to those already available to the States, the Court concludes that Congress did intend that Federal law prevail as to the method of reaching the plaintiff's husband's interest in the overpayment.

DUE PROCESS

Plaintiff's final objection concerns the due process clause of the Fifth

Amendment. Plaintiff contends that she is entitled to notice and an opportunity to be heard in regard to the transfer of the overpayment. Plaintiff emphasizes that she is not a judgment debtor and has not participated in any hearing procedure to determine the existence or the amount of any child support obligation.

In order to evaluate plaintiff's due process challenge, the particular procedures employed by defendants must be examined. There are seven steps to this process. First, a determination must be made that an individual owes child support. See 42 U.S.C. § 664(c). This determination is made by State court or administrative order and is presumably a process in which the obligated spouse has participated. Second, after the obligated spouse has failed to make the child support payments, the State agency notifies

the Secretary of the Treasury that the individual has not paid and that a particular amount is past due. 42 U.S.C. § 664(a). Third, the Secretary of the Treasury determines whether any overpayment is due the named individual. Fourth, if there is any overpayment due, the Secretary is authorized to retain an amount equal to the past-due support and to transfer that amount to the State agency. 42 U.S.C. § 664(a). Fifth, the Secretary is to notify the person making the overpayment that "so much of the overpayment as was necessary to satisfy his obligation for past-due support has been paid to the State." 26 U.S.C. § 6402(c). Sixth, if an additional claim is made to the Internal Revenue Service that the amount withheld is in error, the Service will calculate the obligated spouse's interest in the overpayment and will refund the rest.

Seventh, if the parties object to the recalculation, they are informed that they may file suit in the appropriate Federal court.

Two notices have been sent to plaintiff. The first informed her that her overpayment had been paid to the State of Washington to fully or partially satisfy a prior support obligation. The notice directed questions about the obligation to the Department of Social and Health Services in Olympia, Washington. The notice did not indicate that only half of the overpayment created by community earnings would be retained. Instead, it stated that if no other Federal taxes were owed, a refund check for any remaining balance would be issued. The second notice was sent during the pendency of the present action. It stated that pursuant to Washington community property law, half of the

claim for refund was allowed. If plaintiff contested the amount, she could bring suit in the appropriate Federal District Court or the Court of Claims.

There can be little doubt that plaintiff has a property interest in the overpayment. Defendants concede that they may retain only half of the overpayment generated by community earnings. Nonetheless, they retain the full overpayment until an additional claim for refund is made. Placing the onus on the taxpayer to file a claim for a refund is allegedly necessary because "it is impossible for the Internal Revenue Service to make a prior determination of the proper allocation." As the determination simply consists of calculating the community interest in the overpayment and dividing by two, the Court strongly questions the impossibility of a prior conclusion. Even assuming the

impossibility of such a result, there is no reason for the notice sent to plaintiff and her class not informing the nonobligated spouses that only half of the community property overpayment would be retained.

Due process requires "notice reasonable calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 399 U.S. 306, 314 (1949). One of the fundamental purposes of notice is to alert individuals that their interests are being affected and to permit adequate preparation to challenge those activities. See Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1 (1978); Transco Security, Inc. of Ohio v. Freeman, 639 F.2d 318 (6th Cir.), cert. denied, 102